

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

VINCENT FRIED,

Case No.: 2:18-cv-00689-APG-BNW

Plaintiff

Order Granting Motion for Summary Judgment

V.

[ECF No. 27]

WYNN LAS VEGAS, LLC,

Defendant

Plaintiff Vincent Fried sues his former employer, Wynn Las Vegas, LLC, for gender discrimination, hostile work environment, and retaliation. Fried was a manicurist in a salon at Wynn hotel. He contends he was fired while similarly situated female manicurists involved in the same incident that led to his termination were not fired. He also alleges he was subjected to a hostile work environment because he was (1) told to wear a wig to look like a female if he had more appointments, (2) ordered to continue serving a client who requested sexual contact with him and then was teased about it, and (3) told in response to his complaints about unfair distribution of appointments that he was in a female-related job and should consider a job in something else if he did not like it. Finally, he contends he was fired in retaliation for complaining about the incident with the client who made sexual comments to him.

19 Wynn moves for summary judgment, arguing that there is no evidence that Fried was
20 terminated based on gender. Rather, Wynn argues, he was fired because he allowed an underage
21 client to drink alcohol during a pedicure, and a female salon employee was fired for the same
22 conduct during the same incident. Wynn also argues that the comments and incidents about
23 which Fried complains are not sufficiently severe or pervasive to constitute a hostile work

1 environment. Finally, Wynn argues the retaliation claim fails because the decisionmakers did
2 not know about Fried's complaints.

3 Fried responds that he has presented sufficient evidence for a jury to decide whether he
4 was fired based on his gender for an incident in which female manicurists also violated Wynn's
5 policy against serving alcohol to underage patrons, but they were not fired. He also contends
6 that he has presented evidence of several incidents over the last four months of his employment
7 that support a hostile work environment claim. Finally, he contends he complained about the
8 client making sexual comments to him and then sought to speak to his supervisor about how she
9 handled the situation and was fired two weeks later. He thus contends the temporal proximity
10 leads to an inference of retaliation.

11 **I. ANALYSIS**

12 Summary judgment is appropriate if the movant shows "there is no genuine dispute as to
13 any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.
14 56(a), (c). A fact is material if it "might affect the outcome of the suit under the governing law."
15 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if "the evidence
16 is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

17 The party seeking summary judgment bears the initial burden of informing the court of
18 the basis for its motion and identifying those portions of the record that demonstrate the absence
19 of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The
20 burden then shifts to the non-moving party to set forth specific facts demonstrating there is a
21 genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531
22 (9th Cir. 2000); *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th Cir. 2018) ("To defeat
23 summary judgment, the nonmoving party must produce evidence of a genuine dispute of material

1 fact that could satisfy its burden at trial.”). I view the evidence and reasonable inferences in the
2 light most favorable to the non-moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523
3 F.3d 915, 920 (9th Cir. 2008).

4 **A. Gender Discrimination**

5 Title VII makes it unlawful for an employer to discriminate against an individual
6 “because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e–
7 2(a)(1). A plaintiff may establish a prima facie case of Title VII discrimination by showing
8 (1) the plaintiff belongs to a protected class; (2) he or she was performing according to the
9 employer’s legitimate expectations; (3) he or she suffered an adverse employment action; and
10 (4) employees outside of his or her protected class with similar qualifications were treated more
11 favorably. *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028 (9th Cir. 2006). If the
12 plaintiff makes out a prima facie case, “[t]he burden of production, but not persuasion, then shifts
13 to the employer to articulate some legitimate, nondiscriminatory reason for the challenged
14 action.” *Chuang v. Univ. of Cal. Davis*, 225 F.3d 1115, 1123-24 (9th Cir. 2000). “If the
15 employer does so, the plaintiff must then show that the articulated reason is pretextual either
16 directly by persuading the [fact-finder] that a discriminatory reason more likely motivated the
17 employer or indirectly by showing that the employer’s proffered explanation is unworthy of
18 credence.” *E.E.O.C. v. Boeing Co.*, 577 F.3d 1044, 1049 (9th Cir. 2009) (quotation omitted).

19 Fried has established a prima facie case because he has shown that he belongs to a
20 protected class, he was performing according to his employer’s expectations up until the
21 terminating event, he was terminated, and female manicurists involved in the incident were not
22 terminated. Wynn has offered a legitimate, non-discriminatory reason for terminating Fried
23 because it asserts Fried knowingly allowed an underage client to consume an alcoholic beverage

1 during a pedicure, which put Wynn's gaming and liquor licenses in jeopardy. Wynn notes that it
2 terminated a female employee in the salon over the same incident.

3 Even viewing the facts in the light most favorable to Fried, a reasonable jury could not
4 find the Wynn's explanation was pretext for gender discrimination. Fried was fired after an
5 incident where champagne was served to underage clients at the salon. On the date in question, a
6 regular customer entered the salon along with some individuals who were below the legal age to
7 consume alcohol. The customers were assigned different manicurists for their pedicures. During
8 the service, champagne was served.

9 Unlike the other manicurists, Fried followed Wynn's policy and asked his client, who
10 appeared to be under the age of 30, whether she was of legal age to drink. ECF No. 27-5 at 4, 6.
11 His client admitted she was not, so he intercepted the salon attendant who was bringing the
12 champagne, Haley Lager (Lager), and took his client's champagne away. *Id.* at 9. He also told
13 Lager that his client was underage. *Id.* About 15 minutes later, Lager served a second round of
14 drinks and gave a champagne to Fried's client. *Id.* at 12; ECF No. 27-6 at 13. Fried contends he
15 never noticed his client had been served champagne because he was focused on the client's toes
16 and on timely completing the service after the client changed her mind about what she wanted.
17 ECF Nos. 27-5 at 10; 31 at 5.

18 After the pedicures were completed, the customers mentioned to a male barber in the
19 salon that the underage individuals had received champagne. ECF No. 27-5 at 22. The barber
20 reported this to the salon manager, Sarah Barajas (Barajas), at which point an investigation was
21 commenced. *Id.*; ECF No. 27-4 at 26. That investigation was conducted by Sandra Rodriguez
22 (Rodriguez) of Wynn's Employee Relations department, who recommended that Fried and Lager
23 be terminated. ECF Nos. 27-4 at 12; 27-5 at 12; 27-6 at 13. The reasoning was that they were

1 the only two employees who knowingly allowed an underage client to obtain an alcoholic
2 beverage. ECF No. 31-3 at 23-29. Although Fried denied he knew his client received the
3 beverage, Wynn determined that he did because he was observed on the video looking up at his
4 client several times while she had a flute of champagne in her hand and he assisted her out of her
5 chair while she was holding the champagne. ECF Nos. 27-5 at 12, 15, 20; 31-1 at 30.

6 Fried contends Wynn's decision is illogical because he was the only manicurist who
7 followed Wynn's policy of asking those who appear under the age of 30 if they are of legal
8 drinking age and he took her drink away, so it would make no sense that he would later
9 knowingly allow his client to have alcohol. He contends he never saw his client with champagne
10 because he was focused on providing her pedicure, and he points to testimony from other
11 manicurists that this is entirely possible from their experience. And he notes that Wynn's
12 decision essentially rewards the female manicurists for violating Wynn's policy of checking
13 anyone who appears to be under the age of 30.

14 The Wynn's termination decisions may have been unwise and even unfair, but the Wynn
15 was allowed to draw the line between those who knowingly served alcohol to an underage client
16 and those who did not, so long as it did not draw the line based on gender. *Merrick v. Hilton*
17 *Worldwide, Inc.*, 867 F.3d 1139, 1147 (9th Cir. 2017) (stating "an employer's true reasons need
18 not necessarily have been wise or correct, as long as they are not discriminatory" (quotation
19 omitted)). No reasonable jury could find Wynn's decision was pretext for gender discrimination
20 because it fired a female salon employee for the same conduct in the same incident as Fried.
21 Moreover, the termination decision was made by employees who did not work in the salon and
22 who are not alleged to have participated in or known about the alleged gender discrimination in
23 the salon. See ECF Nos. 27-4 at 8, 13, 27; 27-6 at 33; 31-1 at 107.

1 Fried denies he knowingly allowed his client to have champagne, but the Wynn need not
2 be correct in its disciplinary decision, it just must not be discriminatory. *Merrick*, 867 F.3d at
3 1147. The Wynn investigator reviewed the videotape which showed Fried looking up several
4 times at his client and helping her out of her chair while she held champagne. Fried also
5 mentioned in his voluntary statement that he saw his client had champagne when he was “almost
6 done with the service.” ECF No. 27-5 at 9. The question here is not whether Wynn made a
7 proper termination decision but whether it made a discriminatory one. No reasonable jury could
8 find that it did.

9 Fried relies on other incidents of gender discrimination in the salon as circumstantial
10 evidence that his termination was based on gender. First, he argues that the females received
11 more appointments than the males and that the salon’s managing director, Claude Baruk, once
12 took an appointment away from Fried because he thought a female could perform the service
13 better. However, Fried admitted at his deposition that the imbalance in appointments was caused
14 by customer preferences and he could not come up with a solution for this problem other than the
15 balancing system that he created for the salon.¹ ECF No. 27-3 at 8-12, 28. And there is no
16 evidence Baruk was involved in the termination decision, so the single instance of him allegedly
17 taking an appointment away does not raise an inference of gender discrimination motivating the
18 termination. ECF Nos. 27-4 at 13; 27-6 at 33.

19 Fried and fellow male salon employee Van Lee Duong testified that the male employees
20 were verbally reprimanded when similarly situated female employees were not. ECF Nos. 31 at
21 3; 31-2 at 2. However, they do not identify specific examples nor do they explain how they, as
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23 ¹ Fried has not argued that the Wynn’s accommodation of the customers’ preferences was itself
discriminatory, so I do not address that issue.

1 non-management employees, would know whether female employees were reprimanded for
2 similar conduct. ECF No. 27-3 at 18 (Fried admitting that he was not a management employee
3 and would not have access to other employees' disciplinary records). Nor has Fried presented
4 evidence that the individuals who gave him verbal reprimands were involved in his termination
5 decision.

6 Finally, Fried argues that he had to apply for medical accommodations when similarly
7 situated female employees did not have to do so. However, the evidence shows that the female
8 employees likewise had to apply for accommodations. ECF No. 27-4 at 12, 23.

9 In sum, no reasonable jury could find the Wynn's reason for terminating Fried was
10 pretext for gender discrimination. I therefore grant Wynn's motion for summary judgment on
11 this claim.

12 **B. Hostile Work Environment**

13 "A plaintiff asserting a Title VII claim under a hostile work environment theory must
14 show (1) the existence of a hostile work environment to which the plaintiff was subjected, and
15 (2) that the employer is liable for the harassment that caused the hostile environment to exist."
16 *Freitag v. Ayers*, 468 F.3d 528, 539 (9th Cir. 2006). "To establish the existence of a hostile work
17 environment, a plaintiff must prove that (1) [he] was subjected to verbal or physical conduct of a
18 sexual nature, (2) this conduct was unwelcome, and (3) this conduct was sufficiently severe or
19 pervasive to alter the conditions of . . . employment and create an abusive working
20 environment." *Id.* (quotation omitted).

21 The harassing conduct must be both objectively and subjectively offensive. *Faragher v.*
22 *City of Boca Raton*, 524 U.S. 775, 787 (1998). When assessing whether conduct is objectively
23 offensive, I view the conduct from "the perspective of the reasonable victim." *Brooks v. City of*

1 *San Mateo*, 229 F.3d 917, 924 (9th Cir. 2000). To determine whether an environment is hostile,
2 I consider “the totality of the circumstances, including the frequency of the discriminatory
3 conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive
4 utterance; and whether it unreasonably interferes with an employee’s work performance.” *Ray v.*
5 *Henderson*, 217 F.3d 1234, 1245 (9th Cir. 2000) (quotation omitted). “Not every insult or
6 harassing comment will constitute a hostile work environment.” *Id.* But “[r]epeated derogatory
7 or humiliating statements . . . can constitute a hostile work environment.” *Id.*

8 “A single incident of harassment . . . can support a claim of hostile work environment
9 because the frequency of the discriminatory conduct is only one factor in the analysis.” *Little v.*
10 *Windermere Relocation, Inc.*, 301 F.3d 958, 967 (9th Cir. 2002) (internal quotation marks
11 omitted). However, that single incident must be “extremely severe.” *Brooks*, 229 F.3d at 926.

12 Fried has not presented evidence from which a reasonable jury could find that the
13 sporadic comments regarding wearing a wig, that he should find a job cooking, or that he
14 enjoyed the customer’s sexual remarks were sufficiently severe and pervasive to create a hostile
15 work environment. See ECF Nos. 31 at 3, 5. Courts have rejected hostile work environment
16 claims on more severe and pervasive conduct. See, e.g., *Manatt v. Bank of Am., NA*, 339 F.3d
17 792, 798-99 (9th Cir. 2003) (no hostile work environment where colleagues told used the phrase
18 “China Man,” pulled eyes back with fingers to mock appearance of Asians, and ridiculed
19 plaintiff for word mispronunciation); *Vasquez v. Cty. of L.A.*, 349 F.3d 634, 642-43 (9th Cir.
20 2003), *as amended* (Jan. 2, 2004) (no hostile environment where employee was yelled at in front
21 of others, told that he had “a typical Hispanic macho attitude,” that he should work in the field
22 because “Hispanics do good in the field”).

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1 As for the incident where Fried's supervisor allegedly made him continue to provide
2 service to a customer who was sexually propositioning him, a single incident can constitute a
3 hostile work environment. But considering the totality of the circumstances, the incident was
4 less severe than those where courts have found a single incident could support a hostile work
5 environment claim, such as where the employee was raped by a client. *See, e.g., Little*, 301 F.3d
6 at 964. Fried was not touched physically, other than a brief touch on the arm. ECF No. 27-3 at
7 20-21. And the incident did not unreasonably interfere with his work performance. He was not
8 isolated in a room alone with the customer where others could not observe, and he was able to
9 complete the customer's appointment (which lasted approximately 35 minutes). ECF No. 27-3 at
10 19-23. I therefore grant Wynn's motion for summary judgment on the hostile work environment
11 claim.

12 **C. Retaliation**

13 To make out a prima facie retaliation case, a plaintiff must show that he or she “engaged
14 in protected activity,” that he or she suffered a “materially adverse action,” and that “there was a
15 causal relationship between the two.” *Westendorf v. W. Coast Contractors of Nev., Inc.*, 712 F.3d
16 417, 422 (9th Cir. 2013). “An employee engages in protected activity when [he] opposes an
17 employment practice that either violates Title VII or that the employee reasonably believes
18 violates that law.” *Id.* (quotation omitted). An adverse employment action means “any adverse
19 treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party
20 or others from engaging in protected activity.” *Ray*, 217 F.3d at 1242-43 (quotation omitted).

21 “Title VII retaliation claims require proof that the desire to retaliate was the but-for cause
22 of the challenged employment action.” *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338,
23 352 (2013). “This requires proof that the unlawful retaliation would not have occurred in the

1 absence of the alleged wrongful action or actions of the employer.” *Id.* at 360. Causation “may
2 be inferred from proximity in time between the protected action and the allegedly retaliatory
3 employment decision.” *Ray*, 217 F.3d at 1244 (quotation omitted). The plaintiff “must make
4 some showing sufficient for a reasonable trier of fact to infer that the defendant was aware that
5 the plaintiff had engaged in protected activity.” *Raad v. Fairbanks N. Star Borough Sch. Dist.*,
6 323 F.3d 1185, 1197 (9th Cir. 2003), *opinion amended on denial of reh’g*, No. 00-35999, 2003
7 WL 21027351 (9th Cir. May 8, 2003).

8 I grant Wynn’s motion for summary judgment on this claim because Fried has not
9 presented evidence from which a reasonable jury could find that the Wynn employees who made
10 the decision to terminate Fried’s employment knew about his protected activity in complaining
11 to Barajas about the client who sexually propositioned him. The investigation was conducted by
12 Rodriguez, who is the one who recommended Fried and Lager be terminated. The four
13 individuals who approved the termination did not work in the salon and there is no evidence they
14 knew about Fried’s complaint. ECF Nos. 27-4 at 13; 31-1 at 107.

15 Fried points to evidence that Barajas was the “originator” of his termination notice. ECF
16 No. 31-1 at 107. But that same evidence shows that four other individuals outside of the salon
17 “approved” the termination. *Id.* Barajas, who was no longer employed by Wynn at the time of
18 her deposition, testified that she did not participate in the decision to terminate Fried. ECF No.
19 27-4 at 27.

20 Finally, Fried argues that causation can be inferred from the proximity in time between
21 his complaint to Barajas and his termination. But proximity must be considered in factual
22 context. *Coszalter v. City of Salem*, 320 F.3d 968, 978 (9th Cir. 2003). The alcohol incident
23 occurred the day after Fried complained to Barajas about his client. ECF Nos. 27-3 at 20; 31 at 4.

1 Additionally, the decisionmakers were unaware of his complaint. Thus, the timing alone does
2 not raise an inference of retaliatory motive under these circumstances. Consequently, a
3 reasonable jury could not find that his complaint to Barajas was the but-for cause of his
4 termination.

5 **II. CONCLUSION**

6 I THEREFORE ORDER that defendant Wynn Las Vegas, LLC's motion for summary
7 judgment (**ECF No. 27**) is GRANTED. The clerk of court is instructed to enter judgment in
8 favor of defendant Wynn Las Vegas, LLC and against plaintiff Vincent Fried, and to close this
9 case.

10 DATED this 26th day of March, 2020.



11
12 ANDREW P. GORDON
13 UNITED STATES DISTRICT JUDGE
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